STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MARTHA S. PRIDEMORE,

Plaintiff,

vs. Case No. 2006-1404-CH

EDUARDO V. RODRIQUEZ aka
Edward Rodriquez, an individual; and
DAVID CREED, an individual;

Defendants.

_____/

OPINION AND ORDER

Plaintiff Martha Sue Pridemore moves for a preliminary injunction.

I. BACKGROUND

Plaintiff filed this action on March 31, 2006 asserting her father purchased the improved real property located at 13682 Julius (Warren) where she resides. Plaintiff avers her father died in September 1991 and the home was transferred to her. She refinanced the mortgage in 1996 and her payments were approximately $300 per month.

Plaintiff states she was declared mentally incompetent in 2002 and placed under a guardianship (Macomb County Probate Court, Case No. 2002-171633-DA); she claims to suffer from brain trauma and severe depression.

Plaintiff contends she fell behind on her mortgage payments in late 2004 and faced foreclosure. Defendant Eduardo V. Rodriquez located plaintiff's address from a public foreclosure list in December 2005 and sent her correspondence describing a transaction that would "save her life and home" by finding an investor who would help save plaintiff's home.

Defendant Rodriquez arranged for funding from defendant David Creed—from whom defendant Rodriquez had attended a real estate investment seminar in Florida—to redeem the property on plaintiff's behalf. Defendant Rodriquez explained the redemption transaction would pay plaintiff's outstanding mortgage balance and allow her to remain in the house rent-free for two years.

Plaintiff asserts she entered into a purchase agreement with defendant Rodriquez on January 14, 2005. Under the agreement, defendant Rodriquez would purchase the house for $62,000 although it had a fair market value of $90,000. As a result, plaintiff avers she was stripped of all of her equity in the property.

Plaintiff claims she was to receive, based on the HUD Settlement Statement, proceeds of $27,000 at closing but did not. Instead, the purchase agreement required payment to plaintiff in the form of a promissory note for $15,000 and three payments of $6,000 within one year. Plaintiff contends defendant Rodriquez took approximately $7,000 in cash from plaintiff at closing and wrote a promissory note for only $12,000 of which $5,000 is still owed. Plaintiff also denies receiving the sum of $15,239.69 at closing as identified in the Closing Statement.

Plaintiff maintains she believed at all times that this deal would help pay off her outstanding mortgage and save her house. However, defendant Rodriquez executed a lease agreement allowing plaintiff to live in the house, rent-free, for two years with an option to purchase or extend the lease at the end of two years.

Plaintiff declares defendant Creed obtained a mortgage to the property from defendant Rodriquez. The mortgage was recorded on January 14, 2005. After defendant Rodriquez failed to make the mortgage payments, defendant Creed acquired title to the property following a foreclosure sale in August 2005. Defendant Creed subsequently filed an eviction proceeding in

the 37th Judicial District Court and a writ requiring plaintiff to vacate the property was to issue on May 1, 2006.

Accordingly, plaintiff's complaint alleges: I. Purchase Agreement and Resulting Conveyances are Voidable; II. Equitable Mortgage and III. Fraud and Misrepresentation.

A *Temporary Restraining Order and Order to Show Cause* was entered April 4, 2006 that essentially stayed the eviction proceedings. Plaintiff's initial request for a preliminary injunction was denied, without prejudice, on May 22, 2006 but the TRO was extended.

Plaintiff now renews her motion for a preliminary injunction.

II ANALYSIS

In *Michigan State Employees Ass'n v Dep't of Mental Health,* 421 Mich 152, 157-158; 365 NW2d 93 (1984), our Supreme Court stated:

> Whether a preliminary injunction should issue is determined by a four-factor analysis: harm to the public interest if the injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; [footnote omitted] and demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. See [MCR 3.310(A).] This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant. [Footnote omitted.]

Other considerations surrounding the issuance of a preliminary injunction are whether it will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief prior to a hearing on the merits. *Campau v McMath,* 185 Mich App 724, 729; 463 NW2d 186 (1990). Status quo is the last actual, peaceable, non-contested status that preceded the pending controversy. *Attorney General v Thomas Solvent Co,* 146 Mich App 55, 61; 380 NW2d 53 (1985). Furthermore, it is well established that the burden of proof in a suit for injunctive relief is always upon the moving party. *Sweet v Local 552, Barbers & Beauticians Union, AFL-CIO,* 365 Mich 79; 112 NW2d 218 (1962).

There is little harm to the public interest if an injunction issues and greater harm if an injunction does not issue. While generally the public interest would favor enforcing contracts, there are questions as to plaintiff's competency and ability to enter into contracts.[1] From the limited evidence available for review, it would appear plaintiff has been under a conservatorship since 2002. It is also unclear why defendant Creed, having essentially succeeded to defendant Rodriquez' interests, would not be subject to the terms of the Offer to Purchase Real Estate (particularly, plaintiff's right to live in the house rent-free for two years, for a third year for $300 per month and thereafter at terms to be negotiated).

The harm to plaintiff in the absence of a stay outweighs the harm to defendant Creed if a stay is granted. In the absence of a stay, plaintiff would apparently be evicted, lose her home and be homeless. Defendant Creed has not proffered any evidence suggesting plaintiff is permitting the property to waste or otherwise suffer a loss in value, precluding any finding that he would be harmed if a stay were to be granted.

Plaintiff claims to be a victim of a "foreclosure rescue scam" in which inadequate consideration was paid for her house.[2] There is limited evidence questioning plaintiff's mental status. The contract language of the Offer to Purchase Real Estate gave plaintiff the right to live in the house for at least three years. Hence, plaintiff has demonstrated a likelihood that she may prevail on the merits.

Plaintiff could suffer irreparable injury if a preliminary injunction is not granted. Given her limited income (the probate record indicates she only receives SSI of $545 per month) and probable inability to move her belongings, she would incur substantial hardship if forced to vacate the

[1]In this regard, defendant Creed would be imputed with the knowledge of defendant Rodriquez, his reputed agent, who had direct dealings with plaintiff.
[2]For purposes of this motion, the issue of fire damages—which were to be repaired by insurance in 2002—has been disregarded.

premises and move her possessions or have her possessions placed at the curb. Plaintiff would also lose her house and it is hornbook law that property is generally considered sufficiently unique to warrant the protection of equity.

Moreover, granting injunctive relief will maintain the status quo of plaintiff being in possession of the premises. Denying injunctive relief would essentially grant defendant Creed his final relief before the issues are resolved.

Defendant Creed's request to require plaintiff to pay rent as a condition to continuing injunction relief is denied as contrary to the contract language permitting her to live in the house rent-free.

III. CONCLUSION

For the reasons set forth above, plaintiff Martha Sue Pridemore's motion for a preliminary injunction is GRANTED.

This *Opinion and Order* neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: JUL 28 2006

DMD/aac

cc: Michael McKeown, Attorney at Law
Eden J. Allyn, Attorney at Law
Joan Odorowski, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

JUL 28 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CAROLYN A. LAFOREST and GERALD H. LAFOREST,

Plaintiffs,

vs.

Case No. 2005-0761-NH

ST. JOHN MACOMB HOSPITAL, assumed name of ST. JOHN HEALTH SYSTEM – DETROIT – MACOMB CAMPUS, a Michigan corporation, THE STANLEY WORKS, a foreign corporation; BOON EDAM, INC., a foreign corporation, and DETROIT DOOR AND HARDWARE CO., a Michigan corporation, Jointly and Severally,

Defendants.

_____/

OPINION AND ORDER

Defendant Detroit Door and Hardware Company ("Detroit Door") has brought a motion for summary disposition.

Plaintiff[1] filed this complaint on February 25, 2005, and later amended her complaint to bring in defendant Detroit Door. Plaintiff asserts that on March 10, 2004, her foot was caught in a revolving door on the premises of St. John Health System Detroit – Macomb Campus ("St. John"), causing her to fall and suffer, *inter alia*, severe injury to her left elbow. Plaintiff alleges that the revolving door was manufactured by defendant Boon Edam; sold, installed and serviced by defendant The Stanley Works ("Stanley"); and subsequently serviced by defendant Detroit

[1] For the sake of convenience, "plaintiff" shall refer only to plaintiff Carolyn LaForest.

Door. Plaintiff alleges negligence and gross negligence as to each defendant. Plaintiff's husband, Gerald LaForest, alleges loss of consortium.

Defendant Detroit Door now brings a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The adverse party may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. MCR 2.116(G)(4). The court must consider all this supporting and opposing material. MCR 2.116(G)(5); and *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

In support of its motion for summary disposition, Detroit Door argues that plaintiff has failed to proffer any evidence whatsoever in support of her claim that Detroit Door negligently maintained the door in question. Detroit Door notes that it was not in control of the premises on which she was injured, and thus did not have any duty to ensure the safety of the premises or

warn invitees. Detroit Door also claims that it only serviced the doors when contacted by St. John, and had not serviced the doors for almost one year prior to the alleged incident. Next, Detroit Door argues that it cannot be held liable for breach of duty as a maintenance provider unless plaintiff demonstrates a duty separate and distinct from those under the contract, which Detroit Door avers plaintiff has not done. Finally, Detroit Door argues that plaintiff has proffered no evidence that it engaged in grossly negligent conduct with respect to the maintenance of the door.

In response, plaintiff claims that there is a genuine issue of material fact as to whether Detroit Door had an ongoing service contract with St. John. Plaintiff claims that defendant Detroit Door did have a common law duty to plaintiff separate and distinct from its contractual obligations, and plaintiff distinguishes the case at bar from the authority cited by Detroit Door in its motion. However, plaintiff concedes that she has not discovered any evidence of gross negligence. Plaintiff also concedes that her complaint is presently deficient, but requests that the Court grant leave to amend the complaint. Lastly, plaintiff requests that, in the event summary disposition is granted in Detroit Door's favor, the Court also enter an order precluding the remaining defendants from making any arguments during trial suggesting that Detroit Door is a non-party at fault.

The Court shall first address Detroit Door's request for summary disposition pursuant to MCR 2.116(C)(8). This motion appears to be primarily based on Detroit Door's argument that it cannot be held liable for breach of duty as a maintenance provider since plaintiff has not demonstrated a duty separate and distinct from those under the contract.

The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff, since it "is axiomatic that there can be no tort liability unless defendants owed a duty to

plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). "If one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004) (citation omitted). However, "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Id.* at 466 (citation omitted). Rather, the threshold question is whether a defendant breached a duty *separate* and *distinct* from the duties the defendant assumed under the contract. *Id.* at 467. One such separate and distinct duty is to refrain from creating new hazards. *Id.* at 469. Another separate and distinct duty is the "common-law duty to act in a manner that does not cause unreasonable danger to the person or property of others." *Ghaffari v Turner Const Co*, 268 Mich App 460, 466; 708 NW2d 448 (2005) (citation omitted).

A plaintiff may also establish that he is owed a duty separate and distinct from defendant's duties under a contract by showing that he is a third party beneficiary of the contract. See, e.g., MCL 600.1405. A third-party beneficiary may be a member of a sufficiently described class, and this "class must be something less than the entire universe." *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002). However, "a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation 'directly' to or for the person." *Id.*

As a preliminary matter, the Court disagrees with plaintiff's contention that she was a third party beneficiary of the alleged maintenance contract simply because she was as an invitee using the hospital's revolving doors. The duty which Detroit Door allegedly undertook was clearly intended to benefit St. John. Any benefit which the contract might have had for third parties was purely incidental, and nothing presented to this Court even remotely suggests that

Detroit Door undertook its contractual obligations directly for the benefit of individuals in plaintiff's class.

Plaintiff's complaint outlines several "duties" which defendant Detroit Door allegedly breached. Specifically, plaintiff alleges that Detroit Door failed to ensure the revolving door was safe, failed to maintain the door in a safe manner, failed to place reasonable warnings on the door, failed to ensure the door's safety system would detect people, failed to repair the door, failed to ensure the door did not operate with excessive speed and force, and other unspecified acts of negligence. However, plaintiff does not allege that Detroit Door was in control of the premises at the time of her injury. Moreover, none of plaintiff's allegations *explicitly* state that Detroit Door owed a duty to plaintiff separate and distinct from its contractual obligations, that Detroit Door's maintenance of the door created a new hazard, or that plaintiff was a third party beneficiary of the maintenance contract.

Nevertheless, the allegations at least *imply* that Detroit Door's maintenance of the door might have either (1) contributed to the creation of a new hazard (i.e., defective sensors) which caused plaintiff's injury or (2) caused an unreasonable danger to others. While these implicit "allegations" do not rectify the deficiencies in plaintiff's complaint, plaintiff concedes that her complaint is currently inadequate and has requested leave to amend it. In the case at bar, the Court is satisfied that the interests of justice support allowing plaintiff to amend her complaint. See MCR 2.118(A)(2). As such, the Court believes that summary disposition of plaintiff's negligence claim as to defendant Detroit Door should not be granted pursuant to MCR 2.116(C)(8).

Next, the Court turns to Detroit Door's request for summary disposition under MCR 2.116(C)(10). Detroit Door provides the affidavit of its vice-president indicating that Detroit

Door did not have a continuing maintenance agreement with St. John, and that the last date on which Detroit Door had serviced the doors was March 13, 2003.[2] Detroit Door's Exhibit H, Affidavit of Alan Hull; and see Detroit Door's Exhibit I, Service Reports. *Id.*

Plaintiff, however, has provided a copy of St. John's interrogatory answers, indicating that it had contracted with Detroit Door for service of the automatic door in question. Plaintiff's Exhibit A, Defendant St. John's Answers to Interrogatories, answers to interrogatories 11 and 34. Plaintiff has also offered a purchase request from St. John indicating that Detroit Door was responsible for "servic[ing the] automatic doors as needed" during the period from February 1, 2003 to January 31, 2004. Plaintiff's Exhibit B, St. John Health System Purchase Request.[3]

During the hearing on this motion, Detroit Door's attorney correctly pointed out that the purchase request does not necessarily indicate that a service contract actually existed during the time specified. Rather, the purchase request appears to be an essentially internal memorandum. Detroit Door's attorney also questioned the evidentiary value of St. John's interrogatory answers. However, while the documentary evidence certainly does not establish that Detroit Door had entered into a continuing maintenance agreement concerning the doors, the documentary evidence at least indicates that there are genuine issues of material fact concerning the alleged agreement. Therefore, the Court is satisfied that summary disposition pursuant to MCR 2.116(C)(10) is inappropriate on this basis.

Plaintiff has also presented documentary evidence supporting its position that Detroit Door's actions with respect to the door constituted negligence. Specifically, plaintiff presented the affidavit of an expert witness opining that the sensors used on automatic revolving doors

[2] The report for March 13, 2003, indicates that Detroit Door's employee removed "covers" on the door and adjusted its speed setting.

weaken over time and begin to detect objects in a more limited field of vision. Plaintiff's Exhibit C, Affidavit of Warren Davis, Ph.D. at 3. Dr. Davis opines that the inspections needed to safely maintain the sensors are complex, and that the daily inspections undertaken by St. John's staff were totally inadequate. *Id.* at 3-4. Dr. Davis also opines that defendants Stanley and Detroit Door would have been in the best position to maintain the doors and advise St. John of the dangers associated with them. *Id.* at 5. As such, the Court is satisfied that summary disposition under MCR 2.116(C)(10) is inappropriate on this basis as well.

On the other hand, plaintiff concedes in her response to Detroit Door's motion for summary disposition that she has discovered no evidence supporting her claim that Detroit Door was grossly negligent. Therefore, summary disposition of her claim for gross negligence as to Detroit Door is appropriate.

Finally, since summary disposition of plaintiff's substantive claim for negligence as to Detroit Door is properly denied, Detroit Door's request for summary disposition of Gerald LaForest's derivative claim for loss of consortium is also properly denied.

For the reasons set forth above, defendant Detroit Door and Hardware Company's request for summary disposition of plaintiff's negligence claims is DENIED, and Detroit Door's request for summary of disposition of plaintiff's husband's derivative claim for loss of consortium is also DENIED. Plaintiff's request to amend her complaint is GRANTED, and plaintiff is ORDERED to file an amended complaint within 14 days of this Opinion and Order. Defendant Detroit Door's motion for summary disposition of plaintiff's gross negligence claims

[3] The affidavit attached as an exhibit to plaintiff's response is unsigned, but no objection was made to the affidavit during the hearing conducted on July 10, 2006. Further, plaintiff subsequently provided the original signed affidavit to the Court.

is GRANTED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: July 19, 2006

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Alexander B. Jarowyj, Attorney at Law

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